Mohamed Tawfik bin Tun Dr Ismail v HLG Credit Sd Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-03(IM)-183 OF 2010
ZALEHA ZAHARI, RAMLY ALI AND ZAHARAH IBRAHIM JJCA
2 NOVEMBER 2011

Bankruptcy — Creditor's petition — Nature, of — Whether a writ of execution — Whether leave required O 46 r 1 of the Rules of the High Court 1980 to issue bankruptcy notice or creditors petition — Whether leave of court required for substitution of parties

Bankruptcy — Creditor's petition — Parties — Substitution of petitioner — Judgment debt assigned by judgment creditor to assignee — Whether assignee could be substituted as petitioner — Whether leave of court for substitution required

Contract — Assignment — Assignment of judgment debt — Whether complied with requirements of s 4(3) of the Civil Law Act 1956 — Whether debtor given due notice of assignment — Whether valid assignment — Whether an absolute assignment — Whether assignee could enforce judgment debt through bankruptcy proceedings

Limitation — Enforcement of judgment — Interest on judgment sums — Bankruptcy proceedings commenced within 12 years to recover judgment sum — Whether recovery time barred — Whether interest on judgment sums in excess of six years may be recovered — Limitation Act 1953 s 6(3)

On 26 February 1999, the first respondent obtained a judgment against the appellant at the High Court. On 11 October 2004 the first respondent filed a bankruptcy notice ('BN') against the appellant based on the said judgment. On 17 March 2005 the first respondent filed a creditor's petition ('CP'). While the CP was still pending in court, all rights of the first respondent in respect of the appellant's indebtedness under the judgment were assigned to the second respondent vide a deed of assignment dated 24 September 2005. Notices of the assignment were given to the appellant. The first respondent then filed an application seeking an order to substitute the second respondent as the judgment creditor in the said bankruptcy proceedings. Upon hearing the application inter partes, the learned SAR allowed the application. The appellant's appeal to the judge in chambers against the decision of the learned

SAR was dismissed. Hence the present appeal. The main issue before the court was whether upon absolute assignment of the judgment debt, the second respondent (the assignee) could be substituted for the first respondent (the assignor) as the judgment creditor in the pending bankruptcy proceedings. The appellant contended: (i) that the High Court in purporting to exercise bankruptcy jurisdiction lacked jurisdiction to hear or to make any decision which touched on the validity of an assignment of the debt owing under a judgment; (ii) that the second respondent lacked the locus to execute the judgment or to otherwise continue the bankruptcy proceedings due to their failure to obtain leave of court to execute the judgment pursuant to the provisions of O 46 r 2(1)(b) of the Rules of the High Court 1980 ('RHC'); (iii) that the powers exercisable by the High Court under its bankruptcy jurisdiction by virtue of s 24(c) of the Courts of Judicature Act 1964 ('CJA') are confined and limited to only such powers that are provided for in the Bankruptcy Act 1967 ('Act'). It was submitted that the bankruptcy court in Johor Bahru had no jurisdiction to deal with the application as it related to the issue of validity of an assignment of an alleged unsatisfied debt under a judgment given by the Kuala Lumpur High Court; (iv) that due to his failure to obtain leave of court to enforce the judgment, the second respondent could not be said to be a person who was '*for the time being entitled to enforce a judgment*' within the meaning of the proviso to s 3(1)(i) of the Act; and (v) that the assignment comprised of interest under the judgment which was for a period in excess of six years from the date when the interest became due, the recovery which, according to the appellant, was barred by s 6(3) of the Limitation Act 1953. Hence, the appellant argued that the said assignment was not an absolute assignment within the meaning of the provisions of s 4(3) of the Civil Law Act 1956 ('CLA 56') and therefore not effectual in transferring to the second respondent the legal rights and remedies under the judgment.

Held, dismissing the appeal with costs:

(1) Under s 4(3) of the CLA 56, in order for an assignment to be effective in law, it must be made in writing, under the hand of the assignor; relate to any debt or other legal chose in action; written notice must be given to the debtor or other person from whom the assignor would have been entitled to receive or claim the debt or choose in action. The legal effect of an assignment which duly complies with all the relevant requirements, is that it passes and transfers the legal right to the debt or chose in action, from the date of the notice and all legal and other remedies from the same and the power to give good discharge for the same, without the concurrence of the assignor (see para 13).

(2) For a legal assignment to be valid, express notice in writing must be given to the debtor, but this does not require formal notice. It is sufficient if information relating to the assignment is conveyed to the debtor so that

he has notice of the assignment; *Harris Adacom Corporation v Perkom Sdn Bhd* [1994] 3 MLJ 504 referred (see para 14).

(3) The deed of assignment made by the first respondent as the assignor in favour of the second respondent as the assignee, had complied with all the relevant requirements stipulated under s 4(3) of the CLA 56. The relevant notices were given twice to the appellant as the judgment debtor (see para 15).

(4) Besides the total debt outstanding, all advantages and benefits under the judgment were also assigned to the second respondent. The assignment was an absolute assignment, valid and effective in law. Being a valid and absolute assignment, it could be enforced by the second respondent in a court of law, including the bankruptcy court, as in the present case. The second respondent was therefore entitled to be substituted as the judgment creditor in place of the first respondent (see paras 16–19).

(5) There are strong authorities which say that bankruptcy proceedings do not fall within the ambit of writ of execution as defined under O 46 r 1 of the RHC. Even assuming O 46 r 2 of the RHC, is applicable to bankruptcy proceedings, it is clear from the very wordings of the provisions that leave would only be needed when the BN and CP are issued. In the present case, the BN and CP had already been issued in the name of the first respondent. The application for substitution of the judgment creditor came after the 'writ of execution' was issued. Order 46 r 2(1)(b) of the RHC clearly refers to cases where there has bee n a change in parties before a 'writ of execution' is issued (see paras 27–30).

(6) The deed of assignment in question was a legally valid absolute assignment under s 4(3) of the CLA 56. The second respondent was clearly *'a person who is for the time being entitled to enforce a final judgment or final order and shall be deemed to be a creditor who has obtained a final judgment or final order'* as stipulated under the proviso to s 3(1)(i) of the Act (see paras 33 & 35).

(7) The judgment was dated 26 January 1999; and the bankruptcy proceedings commenced on 11 October 2004. At the date of filing of the bankruptcy proceedings there was no issue of limitation *vis a vis* interest. The proceedings were brought within the stipulated period of 12 years under the same section. It was a valid proceeding then (see para 37).

[Bahasa Malaysia summary

Pada 26 Februari 1999, responden pertama mendapat penghakiman terhadap perayu di Mahkamah Tinggi. Pada 11 Oktober 2004 responden pertama memfailkan notis kebankrapan ('NK') terhadap perayu berdasarkan penghakiman tersebut. Pada 17 Mac 2005 responden pertama memfailkan petisyen pemiutang ('PP'). Sementara PP masih belum selesai di mahkamah,

kesemua hak responden pertama berhubung keterhutangan perayu di bawah penghakiman diserahkan kepada responden kedua melalui surat ikatan penyerahhakkan bertarikh 24 September 2005. Notis penyerahan diberikan kepada perayu. Responden pertama kemudiannya memfailkan permohonan bagi menggantikan responden kedua sebagai pemiutang penghakiman di dalam prosiding kebankrapan tersebut. Selepas mendengar permohonan secara *inter partes*, timbalan pendaftar yang bijaksana membenarkan permohonan tersebut. Rayuan perayu kepada hakim dalam kamar terhadap keputusan timbalan pendaftar ditolak. Oleh itu rayuan ini dibuat. Isu utama di di hadapan mahkamah ialah sama ada melalui penyerahan hak mutlak hutang penghakiman, responden kedua (penerima hak) boleh menggantikan responden pertama (penyerah hak) sebagai pemiutang penghakiman dalam prosiding kebankrapan yang belum selesai. Perayu menghujah: (i) bahawa Mahkamah Tinggi yang menjalankan bidang kuasa kebankrapan tidak mempunyai bidang kuasa untuk mendengar atau membuat sebarang keputusan yang menyentuh mengenai kesahan penyerahan hak hutang yang terhutang di bawah satu penghakiman; (ii) bahawa defendan kedua tidak mempunyai *locus* untuk menjalankan penghakiman atau sebaliknya meneruskan prosiding kebankrapan kerana kegagalan mereka untuk mendapatkan kebenaran mahkamah untuk menjalankan penghakiman menurut peruntukan A 46 k 2(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); (iii) bahawa kuasa yang boleh digunakan oleh Mahkamah Tinggi di bawah bidang kuasa kebankrapan menurut s 24(c) Akta Mahkamah Kehakiman 1964 ('AMK') tertakluk dan terhad hanya kepada kuasa-kuasa yang dinyatakan dalam Akta Kebankrapan 1967 ('Akta'). Dihujahkan bahawa mahkamah kebankrapan di Johor Bahru tidak mempunyai bidang kuasa untuk mengendalikan permohonan memandangkan ia berhubung isu kesahan penyerahan hak hutang yang dikatakan tidak dibayar di bawah satu penghakiman yang diberikan oleh Mahkamah Tinggi Kuala Lumpur; (iv) bahawa kerana kegagalannya mendapatkan kebenaran mahkamah untuk menguatkuasakan penghakiman, responden kedua tidak boleh dikatakan sebagai seseorang yang *'pada masa tersebut berhak untuk menguatkuasakan penghakiman*' dalam erti kata syarat kepada s 3(1)(i) Akta; dan (v) bahawa penyerahan hak tersebut adalah termasuk faedah di bawah penghakiman bagi tempoh melebihi enam tahun daripada tarikh apabila faedah perlu di bayar, dapatan yang mana menurut perayu, telah dihadkan oleh s 6(3) Akta Had Masa 1953. Oleh itu, perayu menghujah bahawa penyerahan hak itu bukannya penyerahan hak mutlak seperti yang dimaksudkan oleh peruntukan s 4(3) Akta Undang-Undang Sivil 1956 ('AUS 56') dan oleh itu tidak berkesan dalam memindahkan kepada responden kedua hak-hak di sisi undang-undang dan remedi-remedi di bawah penghakiman.

Diputuskan, menolak rayuan dengan kos:

(1) Di bawah s 4(3) AUS 56, untuk menjadikan penyerahan hak boleh

dikuatkuasakan dari segi undang-undang, ia perlu dibuat secara bertulis oleh penyerah hak; berkenaan mana-mana hutang atau tindakan undang-undang lain; notis bertulis perlu diberikan kepada penghutang atau orang lain yang daripadanya penyerah hak itu berhak untuk menerima atau menuntut hutang atau memilih dalam tindakan. Kesan di sisi undang-undang penyerahan hak yang memenuhi kesemua keperluan relevan ialah, ia memberikan dan memindahkan kesemua hak di sisi undang-undang kepada hutang atau memilih dalam tindakan daripada tarikh notis dan kesemua undang-undang atau remedi-remedi lain daripadanya dan kuasa untuk memberikan pelepasan kepadanya tanpa persetujuan penyerah hak (lihat perenggan 13).

(2) Untuk menjadikan penyerahan hak sebagai sah di sisi undang-undang, notis perlu dibuat secara bertulis kepada penghutang tetapi ini tidak memerlukan notis formal. Adalah mencukupi sekiranya maklumat berkenaan penyerahan hak diberitahu kepada penghutang agar dia mengetahui mengenai penyerahan hak tersebut; *Harris Adacom Corporation v Perkom Sdn Bhd* [1994] 3 MLJ 504 dirujuk (lihat perenggan 14).

(3) Surat ikatan penyerahhakkan yang dibuat oleh responden pertama sebagai penyerah hak bagi pihak responden kedua sebagai penerima hak telah memenuhi kesemua keperluan yang dinyatakan di bawah s 4(3) AUS 56. Notis-notis yang relevan diberikan dua kali kepada perayu sebagai penghutang penghakiman (lihat perenggan 15).

(4) Di samping jumlah hutang belum dibayar, kesemua kelebihan dan faedah di bawah penghakiman diserahkan kepada responden kedua. Penyerahan hak tersebut merupakan penyerahan hak mutlak, sah dan berkesan dari segi undang-undang. Sebagai penyerahan hak yang sah dan mutlak, ia boleh dikuatkuasakan oleh responden kedua di mahkamah undang-undang, termasuklah mahkamah kebankrapan seperti di dalam kes ini. Oleh itu responden kedua berhak untuk digantikan sebagai pemiutang penghakiman menggantikan responden pertama (lihat perenggan 16–19).

(5) Terdapat autoriti-autoriti yang mengatakan bahawa prosiding kebankrapan tidak termasuk di dalam writ perlaksanaan seperti yang didefinisikan di bawah A 46 k 1 KMT. Malah, dengan menganggap A 46 k 2 KMT terpakai kepada prosiding kebankrapan, adalah jelas daripada setiap perkataan peruntukan bahawa kebenaran hanya diperlukan apabila NK dan PP dikeluarkan. Dalam kes ini, NK dan PP telah pun dikeluarkan dalam nama responden pertama. Permohonan untuk menggantikan pemiutang penghakiman hanya dibuat selepas 'writ perlaksanaan' dikeluarkan. Aturan 46 k 2(1)(b) jelas merujuk kepada kes-kes di mana terdapat perubahan pihak-pihak sebelum 'writ perlaksanaan' dikeluarkan (lihat perenggan 27–30).

(6) Surat ikatan penyerahhakkan yang dipersoalkan merupakan penyerahan mutlak yang sah di sisi undang-undang di bawah s 4(3) AUS 56. Responden kedua jelas merupakan *'seseorang yang pada masa tersebut berhak menguatkuasakan satu penghakiman akhir atau perintah akhir dan dikatakan sebagai pemiutang yang mendapat penghakiman akhir atau perintah akhir'* seperti yang dinyatakan di bawah syarat-syarat kepada s 3(1)(i) Akta (lihat perenggan 33 & 35).

(7) Penghakiman bertarikh 26 Januari 1999; dan prosiding kebankrapan dimulakan pada 11 Oktober 2004. Pada tarikh pemfailan prosiding kebankrapan tidak terdapat isu had dengan faedah. Prosiding-prosiding dikemukakan dalam tempoh yang ditetapkan iaitu 12 tahun di bawah seksyen yang sama. Ini merupakan prosiding yang sah (lihat perenggan 37).]

Notes

For cases on assignment in general, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2846–2903.

For cases on creditor's petition in general, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2773–2809.

For cases on limitation in general, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2232–2240.

Cases referred to

Bankruptcy Notice, Re [1898] 1 QB 383, CA (refd)

Dato' Fathi bin Hj Ahmad v Standard Chartered Bank Malaysia Bhd [2006] 2 MLJ 454; [2006] 1 CLJ 273, CA (refd)

Harris Adacom Corporation v Perkom Sdn Bhd [1994] 3 MLJ 504, HC (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425; [1998] 2 AMR 1666, CA (refd)

Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)

Mohamad Fadzimi Yaakub, ex p United Malayan Banking Corp Bhd, Re [1998] 1 CLJ 783, HC (refd)

Legislation referred to

Banking and Financial Institution Act 1989 s 50
Bankruptcy Act 1967 ss 3(1)(i), 105
Bankruptcy Rules 1969 rr 274, 276
Civil Law Act 1956 s 4(3)
Courts of Judicature Act 1964 s 24(c)
Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 46 rr 1, 2, 2(1)(b)

Appeal from: Bankcrupty No 29–3033 of 2004 (High Court, Johor Bahru)

Peter Pereira (Peter Pereira) for the appellant.
Nad Segaram (Shearn Delamore & Co) for the respondents.

Ramly Ali JCA (delivering judgment of the court):

[1] The present appeal is against the decision of the learned judicial commissioner dated 5 August 2010 dismissing the appellant's appeal against the decision of the learned senior assistant registrar given on 28 January 2010, dismissing the preliminary objection of the appellant and allowing the respondent's application (vide encl 16) to substitute the second respondent ('HLG Capital Market Sdn Bhd') as the judgment creditor in place of the first respondent ('HLG Credit Sdn Bhd') in the pending bankruptcy proceeding.

BRIEF FACTS

[2] On 26 February 1999, the first respondent obtained a judgment against the appellant at the Kuala Lumpur High Court vide Civil Suit No D2–22–476 of 1998. On 11 October 2004, the first respondent filed a bankruptcy notice ('BN') against the appellant at the Johor Bahru High Court vide Bankruptcy Suit No 29–3033 of 2004 based on the above judgment. On 17 March 2005, the first respondent filed a creditor's petition ('CP').

[3] In the meantime, while the CP was still pending in court, all rights of the first respondent in respect of the appellant's indebtedness under the judgment were assigned to the second respondent; vide a deed of assignment dated 24 September 2005. Notices of the assignment dated 23 September 2005 and 11 October 2005 were given to the appellant.

[4] On 1 December 2005, the first respondent filed an ex parte application (encl 16) seeking an order to substitute the second respondent as the judgment creditor in the said bankruptcy proceedings. The said ex parte application was allowed on 26 July 2006.

[5] The appellant then filed an application to set aside the ex parte order dated 26 July 2006. The said application was allowed by the learned SAR on 16 May 2007. On 24 May 2007, the first respondent filed an appeal to the judge in chambers against the SAR order dated 16 May 2007. The learned judge allowed the said appeal that the said order dated 16 May 2007 made by the learned SAR was set aside and directed the first respondent's application dated 1 December 2005 (encl 16) be reheard inter partes.

[6] Upon rehearing encl 16, the learned SAR had, on 28 January 2010,

allowed the application with costs and further ordered that the second respondent be substituted as the judgment creditor in the pending bankruptcy proceedings. The appellant's appeal to the judge in chambers against the decision of the learned SAR dated 28 January 2010 was dismissed with costs on 5 August 2010. Hence the present appeal before this court.

[7] The application in encl 16 was a straightforward application by the first respondent on the ground that as the judgment debt, which is the basis of the bankruptcy proceedings, had been absolutely assigned by the first respondent to the second respondent, therefore the second respondent should be cited as the judgment creditor in the said proceedings.

THE ISSUE

[8] The main issue before the court is whether upon absolute assignment of the judgment debt which forms the basis of the bankruptcy proceedings, the second respondent ('the assignee') can be substituted for the first respondent ('the assignor') as the judgment creditor in the pending bankruptcy proceedings.

[9] The appellant strongly contended that such substitution cannot be done in the present proceedings on the following main grounds:

(a) the High Court in purporting to exercise bankruptcy jurisdiction lacked jurisdiction to hear or to make any decision which touched on the validity of an assignment of the debt owing under a judgment dated 26 February 1999 entered by the first respondent against the appellant at the Kuala Lumpur High Court; and

(b) the second respondent lacked the locus to execute the judgment or to otherwise continue the bankruptcy proceedings initially commenced by the first respondent at the High Court, by reason of their failure to obtain leave from the court which ordered the judgment (Kuala Lumpur High Court) to execute the judgment pursuant to the provisions of O 46 r 2(1)(b) of the Rules of the High Court 1980.

[10] The respondents on the other hand maintained that the said substitution was correct in law and that the bankruptcy court has the jurisdiction to hear and decide on this issue; and the provisions of O 46 r 2(1)(b) of the Rules of the High Court 1980 for to leave to execute judgment is not applicable to bankruptcy proceedings.

ON THE ISSUE OF JURISDICTION

[11] On the issue of jurisdiction, the appellant argued that the powers

exercisable by the High Court under its bankruptcy jurisdiction by virtue of s 24(c) of the Courts of Judicature Act 1964, are confined and limited to only such powers that are provided for in the Bankruptcy Act 1967. The appellant counsel submitted that the bankruptcy court in Johor Bahru has no jurisdiction to deal with encl 16 as it relates to the issue of validity of an assignment of an alleged unsatisfied debt under a judgment dated 26 February 1999 made by the Kuala Lumpur High Court. The appellant submitted that the learned judicial commissioner ought to have applied the principles enunciated by the Court of Appeal in the case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425; [1998] 2 AMR 1666 and rule this issue in favour of the appellant.

[12] The validity of an assignment is governed by s 4(3) of the Civil Law Act 1956, which provides:

> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[13] The gist of s 4(3) of the Civil Act 1956 is that in order for an assignment to be effective in law, it must be made in writing, under the hand of the assignor; relates to any debt or other legal chose in action; written notice must be given to the debtor or other person from whom the assignor would have been entitled to receive or claim the debt or choose in action. The legal effect of an assignment which had duly complied with all the relevant requirements, is that it passes and transfers the legal right to the debt or chose in action, from the date of the notice and all legal and other remedies from the same and the power to give good discharge for the same, without the concurrence of the assignor.

[14] For a legal assignment to be valid, express notice in writing must be given to the debtor, but this does not require formal notice. It is sufficient if information relating to the assignment is conveyed to the debtor so that he has notice of the assignment (see *Harris Adacom Corporation v Perkom Sdn Bhd* [1994] 3 MLJ 504).

[15] In the present case, the said deed of assignment dated 23 September 2005 made by the first respondent as the assignor, in favour of the second respondent, as the assignee, had complied with all the relevant requirements

stipulated under s 4(3) of the Civil Law Act 1956. The relevant notices were given twice on 23 September 2005 and 11 October 2005 to the appellant as the judgment debtor. The said deed of assignment as well as the notices was exhibited as 'M1–1' and 'M1–2' in the affidavit affirmed by Mohd Izral Mohamad Khairy filed by the respondents.

[16] What has been assigned under the deed of assignment is set out in cl 1 thereof. Clause 1 is clear that besides the total debt outstanding as at 23 September 2005 (the date of the deed of assignment), all advantages and benefits under the judgment are also assigned to the second respondent.

Clause 1 clearly provides that 'the assignor hereby assigns absolutely into the assignee and the assignee hereby accepts such assignment from the Effective Date of all the Assignor's title and interest in the said Debt, together with the right to recover and receive payment of the said Debt as well as the benefit of all and any security or collateral given, the benefit and advantage of the judgment. … in respect of the said Debt including but not limited to the right to pursue and/or proceed and/or continue with the said Action against the Defendants and/or in the case where the Defendant and/or Borrower is a bankrupt, the right to receive any and all dividends from the estate of the bankrupt ….'

Clause 2 of the same deed of assignment further provides that 'in respect of the said Action and/or Judgment of the Assignor hereby authorizes the Assignee and the Assignee hereby agrees to proceed with the same in the name of the Assignee and to execute all papers necessary for the continuation of the said Action and to receive the benefit of the same whether in settlement, judgment, foreclosure, sale, surplus monies proceedings, bankruptcy or otherwise'.

[17] From the deed of assignment and the notices sent to the appellant, there is no doubt that the assignment is an absolute assignment of the total debt as well as all other advantages and benefits attached thereto under the judgment. The advantages and benefits under the judgment carry with them the benefit of costs and thus any costs under the judgment are recoverable. This is not a case where the assignor is assigning to the assignee the amount due and owing up to 23 September 2005 only and maintaining rights in respect of outstanding sum after that date.

[18] The court is satisfied that the assignment in question is an absolute assignment, valid and effective in law.

[19] Being a valid and absolute assignment, it can be enforced by the assignee (the second respondent) in a court of law, including the bankruptcy court, as in the present case. The second respondent is therefore entitled to be substituted as the judgment debtor in place of the first respondent in the present bankruptcy proceedings.

[20] The same issue was dealt with by the Court of Appeal in the case of *Dato' Fathi bin Hj Ahmad v Standard Chartered Bank Malaysia Bhd* [2006] 2 MLJ 454; [2006] 1 CLJ 273. In that case, by virtue of s 50 of the Banking and Financial Institutions Act 1989, the assets of the judgment creditor, who was the Standard Chartered Bank, were assigned (by way of a vesting order) to Standard Chartered Bank Malaysia Bhd ('SCBMB'), who then applied by summons to amend the creditor's petition and substitute SCBMB as the judgment creditor in place of Standard Chartered Bank in the pending bankruptcy proceedings (after BN and CB had been issued). With the vesting order all judgments obtained by Standard Chartered Bank were assigned to the newly incorporated Standard Chartered Bank Malaysia Bhd (SCBMB). In opposing the application the judgment debtor in that case contended that the application by SCBMB was to substitute another party to replace the judgment creditor and was not allowed under the Bankruptcy Act or the Bankruptcy Rules.

[21] The objection by the judgment debtor was dismissed by the Court of Appeal. The court held that 'it was only appropriate for the respondent (SCBMB) to amend the petition by substituting the name of Standard Chartered Bank Malaysia Bhd for Standard Chartered Bank because of the vesting order'. The court also held that rr 274 and 276 of the Bankruptcy Rules 1969 would justify the amendments.

[22] The facts in *Dato' Fathi bin Hj Ahmad* case and the present case before this court have something in common: ie both involve the status and effect of valid absolute assignments as a basis to substitute the judgment creditor in pending bankruptcy proceedings and the same nature of applications. In that case, the assignment was valid under s 50 of the Banking and Financial Institution Act 1989; while in the present case, the assignment was valid under s 4(3) of the Civil Law Act 1956. Eventhough their validity is based on a different set of laws, their legal effect is still the same, ie an absolute assignment is validly created. Therefore, it is only appropriate for the respondents in the present case to be accorded the same entitlement in law to substitute the assignee as the judgment creditor in the pending bankruptcy proceedings.

[23] The appellant cited the case of *Malaysia Building Society Bhd v Tan Sri Ungku Nazaruddin bin Ungku Mohamed* to support his contention that the Bankruptcy Act 1967 does not confer any power on the High Court, in the exercise of its bankruptcy jurisdiction to adjudicate on matters relating to the validity of an alleged assignment of debt due under a judgment.

[24] The decision of the Court of Appeal in that case is clearly distinguishable from, and therefore not applicable, to the facts of the present case. In that case, the issue before the court was whether or not the High Court

in a bankruptcy matter has the power to award damages to a debtor upon annulling and rescinding the adjudicating and receiving orders. The court held:

(a) whilst s 24(c) of the Court of Judicature Act 1964 confers a bankruptcy jurisdiction on the High Court, the powers that it may exercise in relation to the rescinding and annulment of receiving and adjudicating orders are to be found at s 105 of the Bankruptcy Act 1967;

(b) s 105 did not confer a power on a High Court exercising bankruptcy jurisdiction the power to award damages; and

(c) hence the bankruptcy court, should not, in rescinding and annulling the receiving and adjudicating orders, have awarded damages for tort of abuse of process.

ORDER 46 R 2 OF THE RULES OF THE HIGH COURT

[25] The appellant also contended that the second respondent (as assignee) lacked the locus to execute the judgment or to continue the bankruptcy proceedings initially commenced by the first respondent at the High Court, by reason of his failure to obtain leave of the court (from the court which ordered the judgment) to execute or to enforce the judgment pursuant to the provisions of O 46 r 2(1)(b) of the Rules of the High Court 1980.

[26] Order 46 r 2(1)(b) provides:

(1) A writ of execution to enforce a judgment or order may not issue without the leave of the court in the following cases, that is to say:

(a) …

(b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;

[27] Order 46 r 2, talks about 'A writ of execution to enforce judgment …' It refers to the process for enforcing or giving effect to the judgment of the court. There are strong authorities which say that bankruptcy proceedings do not fall within the ambit of writ of execution as defined under O 46 r 1 of the RHC 1980. This principle was established as far back as 1898 in the case of *Re a Bankruptcy Notice* [1898] 1 QB 383, where Chitty LJ at p 387, ruled that 'the issue of a bankruptcy notice is not a form of execution', (see Federal Court's decision in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787; *Re Mohamad Fadzimi Yaakub, ex p United Malayan Banking Corp Bhd* [1998] 1 CLJ 783; The Supreme Court Practice 1822, Vol 1, para 46/2/1).

[28] Abdul Hamid Mohamad FCJ in *Perwira Affin Bank* observed as follows:

Furthermore, if we bear in mind that the words used in our O 46 r 2 of the RHC 1980 and in the English Rules are 'A writ of execution to enforce a judgment …', clearly a bankruptcy notice or a bankruptcy petition cannot be 'a writ of execution'. So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 of the RHC 1980.

[29] Even assuming O 46 r 2 of the RHC 1980, is applicable to bankruptcy proceedings, it is clear from the very wordings of the provisions that leave would only be needed in respect of the 'issuance' of the bankruptcy proceedings ie when the bankruptcy notice and creditor's petition were issued. The 'leave' that is referred to in O 46 r 2 refers to 'leave to issue' writ of execution. The word 'issue' means to commence or to take out. In the present case, the bankruptcy notice and creditor's petition have already been issued in the name of the first respondent. The application for substitution of the judgment creditor in the present case came after the 'writ of execution' has been issued. Order 46 r 2(1)(b) clearly intends to refer to cases where there has been a change in parties before a 'writ of execution' is issued.

[30] In the present case, the judgment was obtained by the first respondent. The first respondent then validly commenced the bankruptcy proceeding by issuing bankruptcy notices and creditor's petition. At that stage, there was no requirement at all to get leave under O 46 r 2(1)(b). Any change of parties subsequent to that stage of the proceedings, requires no leave from the court under the said order for the simple reason that the proceedings have commenced when bankruptcy notice and creditor's petition have already been issued.

[31] For the above reasons, this court is of the view that the appellant's contention on this issue is unsupportable and therefore must fall.

OTHER MATTERS

[32] The appellant also raised the issue that by reason of his failure to obtain leave of court to enforce the judgment, the second respondent cannot be said to be a person who is 'for the time being entitled to enforce a judgment' within the meaning of the proviso to s 3(1)(i) of the Bankruptcy Act 1967. In short, the appellant was saying that the second respondent was not a creditor. The appellant argued that before a judgment creditor may issue a bankruptcy notice based on a judgment against a judgment debtor, the judgment creditor must satisfy the criteria stipulated in the provisions of the proviso to s 3(1)(i) of the Act, which reads:

Provided that for the purpose of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order.

[33] We are not in agreement with the appellant on this point. As stated earlier in this judgment, the deed of assignment in question was a legally valid absolute assignment under s 4(3) of the Civil Law Act 1956. Any absolute assignment of any debt of which notice in writing has been given to the debtor or other person from whom the assignor would have been entitled to receive or claim the debt is effective in law to pass and transfer the legal title to the debt to the assignee. In this case, cl 1 of the said deed of assignment provides that 'all the assignor's title and interest in the said Debt together with the right to recover and receive payment of the said Debt as well as the benefit of all and any security or collateral given by the Defendant …; the benefit and advantage of the judgment … but not limited to the right to pursue and/or proceed and/or continue with the said action against the Defendant' were absolutely assigned to the assignee. In cl 2, the assignee had agreed 'to proceed with the Action in the name of the Assignee and to execute all papers necessary for the continuation of the said Action and to receive the benefit of the same whether in settlement, judgment, foreclosure, sale, surplus monies, proceedings, bankruptcy or otherwise'.

[34] On that basis, the second respondent (as the assignee) is clearly 'a person who is for the time being entitled to enforce a final judgment or final order and shall be deemed to be a creditor who has obtained a final judgment or final order' as stipulated under the proviso to s 3(1)(i) of the Bankruptcy Act 1967. Thus the appellant's contention on this issue holds no water and accordingly falls.

[35] Giving the words of cll 1 and 2 of the deed of assignment its ordinary meaning the learned judicial commissioner was right in holding that the said assignment was an absolute assignment within the meaning of the provisions of s 4(3) of the Civil Law Act and not a partial assignment as contended by the appellant. The costs awarded under the final judgment formed part of the subject matter of the assignment. That in law, the second respondent is entitled to be substituted for the first respondent as the judgment creditor in the pending bankruptcy proceedings against the appellant.

[36] The appellant also raised the issue of interest in that the assignment in question comprised of interest under the judgment which was for a period in excess of six years from the date when the interest became due, the recovery which, according to the appellant, was barred by the provisions of s 6(3) of the Limitation Act 1953. That being the case the appellant argued that the said assignment is not an absolute assignment within the meaning of the provisions

of s 4(3) of the Civil Law Act 1956, and therefore not effectual in transferring to the second respondent the legal rights and remedies under the judgment dated 26 February 1999.

[37] We are of the view that the above contention of the appellant is totally misconceived. In this case the judgment was dated 26 February 1999; and the bankruptcy proceedings commenced on 11 October 2004. At the date of filing of the bankruptcy proceedings there was no issue of limitation *vis a vis* interest. The proceedings were brought within the stipulated period of 12 years under the same section. It was a valid proceeding then. Section 6(3) of the Limitation Act 1953 merely states that no arrears of interest in respect of any judgment debt shall be recovered after the expiry of six years from the date on which the interest became due. The issue of recovery of interest after the expiry period of six years raised by the appellant does not in any way affect the validity of the bankruptcy proceedings particularly the bankruptcy notice and the creditor's petition in this case. Thus it is not relevant to the application by the respondents to substitute the judgment creditor vide encl 16, which is before the court.

CONCLUSION

[38] For the above reasons, the court holds that there is no legal impediment to stop the second respondent from substituting the first respondent as the judgment creditor in the pending bankruptcy proceedings against the appellant. The second respondent is clearly entitled in law to do so, in the circumstances of the present case. The appeal is accordingly dismissed with costs of RM5000 to the respondents and directed the deposit to be paid to the respondents on account of costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum